87-1567

Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SUN PIPE LINE COMPANY,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether, on a "motion for reconsideration" under Federal Rule of Civil Procedure 59(e), the failure of the United States District Court to allow an amendment to the complaint pursuant to Federal Rule of Civil Procedure 15, in the absence of prejudice to the defendant, was an abuse of discretion?

2. Whether the District Court had jurisdiction to judicially review the action of the Environmental Protection Agency in denying permission under 40 C.F.R. §§2.401 *et seq*. to Sun Pipe Line Company to videotape a deposition of an agency employee for use in a case in which the United States is not a party?

3. Whether, under the circumstances, the action of the Environmental Protection Agency in denying permission under 40 C.F.R. §§2.041 *et seq*. to Sun Pipe Line Company to videotape a deposition of an agency employee was invalid because it was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law?

THE PARTIES

Plaintiff, petitioner herein, is Sun Pipe Line Company ("SPL"). SPL is incorporated under the law of Pennsylvania and has its principal office in Tulsa, Oklahoma. It owns and operates petroleum pipelines in numerous states, and it transports both refined petroleum products and crude oil. It is presently an indirectly-owned subsidiary of Sun Company, Inc. through a holding company, Sun Pipe Line Company of Delaware.

Defendant, respondent herein, is the Environmental Protection Agency, an agency of the United States government.

RULE 28.1 LISTING

SUN PIPE LINE COMPANY AND SUBSIDIARIES AND AFFILIATES

HOLDING COMPANY

SUN PIPE LINE COMPANY OF DELAWARE

100% OWNED COMPANIES

Sun Pipe Line Company:
- Eastern Area
- Mid-Continent Area
- Southwest Area

Mid-Continent Pipe Line Company
Sun Oil Line Company of Michigan
Sun Pipe Line Services Co.

JOINT VENTURES

Explorer Pipeline Company
Inland Corporation
Mid-Valley Pipeline Company
- Maumee Section

West Texas Gulf Pipe Line Company

UNDIVIDED INTEREST

High Island Pipeline System
Jay Field
Mesa Pipe Line

PARENT COMPANY AND ADDITIONAL AFFILIATES

Adamantech, Inc.
Alliance Enterprise Corporation
Helios Capital Corporation
Helios Service Company
Puerto Rico Sun Oil Company
Radnor Corporation
Sun Carriers, Inc.
Sun Company, Inc. (Parent Company)

Sun Company Information Systems, Inc.
Sun-Del Services, Inc.
Sun Distributors, Inc.
Sunedco Coal Company
Sun Exploration and Production Company
Sun Exploration and Production Company of Pennsylvania, Inc.
Sun Gas Liquids, Inc.
Sun Gas Terminals and Storage (PA), Inc.
Sun Gas Transmission Company, Inc.
Sun Geothermal Company
Sun Marine Terminals, Inc.
Sunoco Credit Corporation
Sunoco Energy Development Co.
Sun Oil Trading Company
Sun Refining and Marketing Company
Sun Shale Oil Company
Sun Ship, Inc.
Sun Tech, Inc.
The Claymont Investment Company
White River Shale Oil Company
Yabucoa Sun Oil Company, Inc.

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No.

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October Term, 1987

SUN PIPE LINE COMPANY,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Sun Pipe Line Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinions pertinent to this Petition are the April 30, 1987 bench ruling of the United States District Court for the District of Massachusetts (A-35 to A-38), the May 8, 1987 Order of the district court denying the "motion for reconsideration" (A-52), and the October 16, 1987 Opinion of the United States Court of Appeals for the First Circuit, 831 F.2d 22 (1st Cir. 1987) (A-1 to A-8).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on October 16, 1987. A Petition For Rehearing Before Original Panel And Rehearing In Banc was filed on October 30, 1987 and denied on November 20, 1987 (A-9).

By Order dated February 11, 1988, Justice White extended the time to file a Petition for Writ of Certiorari to and including March 21, 1988 (A-10).

The Supreme Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. §§1254 (1) and 2101 (c), and Sup. Ct. R. 20.4.

STATUTORY PROVISIONS INVOLVED

The following pertinent statutes are set forth in the Appendix: 5 U.S.C. §§701(a), 702, 706(2)(A), and 28 U.S.C. §1331 (A-11 to A-12).

The following pertinent Federal Rules of Civil Procedure are set forth in the Appendix: Federal Rules of Civil Procedure 15(a), 15(d), and 59(e) (A-12 to A-13).

The following pertinent regulations are set forth in the Appendix: 40 C.F.R. Part 2, Subpart C, §§2.401-2.406 (A-16 to A-20).

STATEMENT OF THE CASE

A. Factual Background, The Underlying Litigation

Sun Pipe Line Company ("SPL") is the owner and operator of an underground petroleum pipeline which runs from Marcus Hook, PA to Newark, NJ. The pipeline was punctured by a cable television contractor on November 12, 1982, in Newtown, Bucks County, PA, resulting in a net loss of approximately 50,000 gallons of unleaded gasoline into the ground. In subsequent months, gasoline vapors entered the basements of a number of homes in an adjacent housing development known as Newtown Crossing.

On or about May 18, 1983, the case of *Pier Cipriani, et al. v. Sun Pipe Line Company, et al.*, No. 83-03557-11-2, was filed in the Court of Common Pleas for Bucks County. The Cipriani case is a class action with nine families named as plaintiffs. Among other things, the complaint alleges property damage and various adverse health effects suffered by the homeowners in Newtown Crossing. The theories of liability alleged against SPL include strict liability and negligence.

Beginning in February 1984, numerous cases were filed by "opt-out" plaintiffs in the Court of Common Pleas for Bucks County, including *Joseph Hudachek, et al. v. Sun Company, Inc., et al.*, No. 84-01113-11-2, and several others. Sun Pipe Line Company, which is a subsidiary of Sun Company, Inc., is also a defendant in the opt-out cases. These suits are similar to the *Cipriani* action in that the plaintiffs are alleging property damage and adverse health effects as a result of the pipeline accident.

In April 1983, before the homeowners' suits were filed, the U.S. Environmental Protection Agency ("E.P.A.") was invited by the Pennsylvania Department of Health to do air monitoring in numerous homes in Newtown Crossing. The monitoring arose out of requests by certain homeowners to the Pennsylvania Department of Health to have an independent agency do testing to obtain unbiased results regarding the levels of hydrocarbons present in their homes. On April 6 and 7, 1983, Dr. Thomas Spittler, Ph.D., of the U.S. E.P.A. Region I Laboratory, did air

monitoring with a portable gas chromatrography machine and Tenax tubes in six homes in Newtown Crossing, and he also sampled the ambient air outside the homes. The homes at which Dr. Spittler did his air sampling were owned by three families who are claimants in the *Cipriani* class action case and three opt-out families, including the Hudacheks.

The air monitoring tests done by E.P.A. in Newtown Crossing were requested by Mr. Gary Schultz of the Pennsylvania Department of Health, and the results were reported by E.P.A. to Mr. Schultz (A-24 to A-28). E.P.A. did not do the testing pursuant to any regulatory program it was then enforcing. However, the Centers for Disease Control, the Pennsylvania Department of Health, and the Bucks County Department of Health used the E.P.A. data (and data obtained by the industrial hygiene firm hired by SPL) to develop health criteria regarding exposure to gasoline vapors.

On February 21, 1985, the Court of Common Pleas certified the class in the *Cipriani* action as to common issues of fact on liability, but it held that each plaintiff would have to prove damages individually. The certified class consists of 200 homeowners.

In September and October, 1986, the liability trial was held in the *Cipriani* action. SPL and four other co-defendants were held by the jury to be causally negligent for the pipeline accident under comparative negligence principles.[1]

Subsequent to the jury verdict on liability, trial preparation began in earnest on the homeowners' damage claims. Two cases in particular, the *Melso* claim (class action plaintiffs), and the *Hudachek* claim (opt-out plaintiffs), were designated by the trial judge as the first two claims to be tried.

In pre-trial discovery, SPL served requests for admissions to the Hudachek and Melso plaintiffs to admit the authenticity

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1. SPL was held 18% liable. The contractor who punctured the pipeline, Tri-State Telecommunications, Inc., was held 40% liable; the cable television company, Davis Enterprises, was held 13% liable; the township engineer, Jan Gouza, and his firm, Pickering, Corts and Summerson, Inc., were held 15% liable; and the firm which drew the maps omitting the pipeline, E.A. Design, Ltd., was held 14% liable.

and truth of the reported results obtained by E.P.A.'s Dr. Spittler. Both the Hudachek and Melso plaintiffs refused to admit the truth of the E.P.A. results without having an opportunity to cross-examine the chemist who did the work (Dr. Spittler) (A-21 to A-28).

B. Sun Pipe Line Company's Request To E.P.A.

In January and again in April 1987, the *Hudachek* trial was scheduled for May 11, 1987.[2] On April 3, 1987, soon after receipt of plaintiffs' answers to the requests for admissions, counsel for SPL wrote to the E.P.A. General Counsel in Washington, D.C. to request permission to videotape a deposition of Dr. Spittler (A-29). The circumstances behind the request were briefly explained in the letter.[3]

The E.P.A. General Counsel's office referred SPL's request to the Regional Counsel's office in Boston. In the meantime, on April 23, 1987, SPL obtained a commission from the court in Bucks County to take an out-of-state deposition of Dr. Spittler. Counsel for SPL desired one videotape deposition of Dr. Spittler at which all interested plaintiffs' counsel could be present. In this manner, counsel for SPL expected that Dr. Spittler would need to testify only once for a period of 1 to 2 hours. On April 28, 1987, counsel for SPL issued a Notice of Deposition to Dr. Spittler and served copies of same to the attorneys of record in the Pennsylvania cases.

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2. Subsequently, on May 6, 1987, the state court postponed the trial date to allow completion of additional discovery.

3. In order for expert witnesses in Pennsylvania courts to render opinion testimony on the hazards of exposure to gasoline vapors, the testimony must be based on the witness's personal knowledge, uncontradicted facts in evidence, or an assumed state of facts reasonably shown by the record. *Kozak v. Struth*, ___Pa. ___ , 531 A.2d 420, 422 (1987). Pennsylvania courts do not follow the Federal Rules of Evidence on expert testimony. *Kozak v. Struth, supra*, 531 A.2d at 423. If a party does not prove the facts which go into the hypothetical question framed to the expert witness, the opinion is based on unproved assumptions and is therefore worthless guess and conjecture. *Rennekamp v. Blair*, 376 Pa. 620, 101 A.2d 669, 672-3 (1954). Thus, if SPL does not prove the E.P.A. results, its expert witnesses will not be able to rely on the E.P.A. data as a basis for their opinions. *Kozak v. Struth, supra*, 531 A.2d at 422-3.

There were several telephone calls in April 1987 between counsel for SPL and the E.P.A. Regional Counsel's office attempting to arrange the deposition, but no agency decision was made until after SPL's petition was filed in the U.S. District Court in Boston on April 29, 1987 (A-31 to A-33). The Regional Counsel, relying on E.P.A. regulations, 40 C.F.R. Part 2, Subpart C, §§2.401 *et seq*., sent a letter that date refusing SPL's request (A-34).

C. Proceedings In U.S. District Court

E.P.A. prepared a brief opposing SPL's petition. A hearing was held before Hon. Walter Jay Skinner, U.S.D.J., on April 30, 1987. The court, relying on *Giza v. Secretary of Health, Education and Welfare*, 628 F.2d 748 (1st Cir. 1980), denied SPL's petition but indicated it might entertain a "motion for reconsideration" if authority was provided (A-38). *Giza* had held that the federal courts could not compel testimony by F.D.A. employees pursuant to a state court subpoena on the basis of the Freedom of Information Act, mandamus jurisdiction, comity, or the Full Faith and Credit Clause of the Constitution. On May 6, 1987, SPL filed a "motion for reconsideration" together with an affidavit by counsel, a memorandum of law, and several exhibits (A-39 to A-51). SPL alleged that *Giza, supra*, is distinguishable, and that E.P.A.'s refusal to permit Dr. Spittler to testify by videotape deposition was arbitrary and capricious agency action subject to judicial review (A-40). SPL cited dictum in *Reynolds Metals Company v. Crowther*, 572 F.Supp. 288, 291 (D.Mass. 1983) ("The narrow basis of this court's decision [refusing to enforce a subpoena for testimony by two O.S.H.A. employees] clearly does not preclude appropriate judicial supervision of a department's exercise of discretion to prohibit testimony by its employees.") (A-40, A-45).

On May 8, 1987, the court entered the following order on SPL's "motion for reconsideration:" "DENIED. The *Reynolds Metals* case cited by petitioner confirms the prior denial of the petition. 5/8/87 W. J. Skinner, USDJ." (A-52). All proceedings were concluded in less than 10 days.

D. Proceedings In The Court of Appeals

In the appeal to the First Circuit, the parties briefed and argued to questions: (1) Was there jurisdiction in the district court to judicially review action of the E.P.A. taken under agency regulations? (2) If so, was the agency action arbitrary, capricious or an abuse of discretion within the meaning of the Administrative Procedure Act (APA)? The E.P.A.'s brief framed its "Issues Presented" in substantially the same terms stated by SPL in its "Questions Presented."

On October 16, 1987, the court of appeals rendered its judgment and opinion holding that Fed. R. Civ. P. 59(e) was the appropriate standard for judging SPL's "motion for reconsideration," and that the trial judge did not abuse his discretion in denying the motion. *Appeal of Sun Pipe Line Company*, 831 F.2d 22, 24-5 (1st Cir. 1987) (A-5). The court held that it need not resolve the question of whether the district court had jurisdiction to review the agency action complained of. *Id*. at 24 (A-4).

The E.P.A. at no time had argued that SPL's appeal should be denied for failure to show an abuse of discretion on the part of the trial judge in denying SPL's "motion for reconsideration." E.P.A. was content to argue that it should win the case because the agency action complained of was committed to agency discretion by law, and therefore there was no jurisdiction under 28 U.S.C. §1331 and the APA. Moreover, E.P.A. never argued that it was in any way prejudiced by the new claim asserted by SPL in the "motion for reconsideration."

SPL's petition for rehearing contended that the "motion for reconsideration" was in substance a motion to vacate the judgment and amend the complaint which should have been allowed pursuant to Fed. R. Civ. P. 15. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The precise question presented was this: "Whether, on a 'motion for reconsideration' under Rule 59(e), the failure of the trial court to allow an amendment to the complaint pursuant to Rule 15, in the absence of prejudice to the defendant, was an abuse of discretion?" The petition for rehearing was denied without explanation on November 20, 1987 (A-9).

REASONS FOR GRANTING THE WRIT

Summary. Normally federal agencies have authority to restrict testimony by their employees when they are subpoenaed to testify in private litigation. *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951); *Giza v. Secretary of Health, Education & Welfare*, 628 F.2d 748 (1st Cir. 1980). However, when a federal agency has regulations establishing criteria which govern when it will allow testimony by its employees in private litigation, there is no reason why agency action in applying those regulations should be exempt from judicial review pursuant to 28 U.S.C. §1331 and the APA. This case presents a novel application of settled principles of law concerning judicial review and it has the potential to limit the doctrine of *Touhy v. Regan*, *supra*. It is an important question of federal law which should be settled by this Court. Sup. Ct. R. 17.1(c).

Whether or not the E.P.A. action in this case was arbitrary, capricious or an abuse of discretion within the meaning of the APA, 5 U.S.C. §706(2)(A), is certainly important to SPL, but we recognize that the decision on this issue should most likely be made at the district court level following remand, assuming this Court agrees that SPL's "motion for reconsideration" stated a valid claim for relief.

The threshold issue is whether the district court and court of appeals properly applied the Federal Rules of Civil Procedure in denying SPL's "motion for reconsideration." It is well-settled that the Federal Rules of Civil Procedure should be construed so as to do substantial justice, *Conley v. Gibson*, 355 U.S. 41, 48 (1957), and cases should be decided on their merits, not technicalities. Whatever its label, SPL's "motion for reconsideration" was in reality a motion to vacate the judgment and amend the complaint, and it should have been allowed pursuant to F. R. Civ. P. 15(a). *Foman v. Davis, supra*. It was an abuse of discretion not to allow SPL to amend its complaint. *Id*. The decisions of the district court and the court of appeals were such departures from the usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision, and said

decisions were also in direct conflict with applicable decisions of this Court. Sup. Ct. R. 17.1(a), (c).

I. IN ITS EVALUATION OF SPL'S "MOTION FOR RECONSIDERATION," THE FAILURE OF THE TRIAL COURT TO ALLOW AN AMENDMENT TO THE COMPLAINT PURSUANT TO RULE 15, ABSENT PREJUDICE TO E.P.A., WAS AN ABUSE OF DISCRETION.

At the April 30, 1987 hearing on SPL's original petition, the district court (Judge Skinner) citing *Giza*, *supra*, made clear his view that SPL had produced no authority to compel the deposition of Dr. Spittler (A-37). The colloquy between the court and SPL's counsel (Mr. Glovsky) shows that counsel made an oral motion for leave to file an amended pleading which would include authority for the requested relief. The court appeared to grant such leave, though it suggested filing a "motion for reconsideration." (A-38).

On May 6, 1987, SPL filed its "motion for reconsideration" (A-39). The motion complained that "the action of the E.P.A. Regional Counsel in refusing to permit the videotape deposition [per the letter dated April 29, 1987]" was arbitrary and capricious agency action subject to judicial review (A-40). The court dismissed SPL's "motion for reconsideration" within 48 hours with a terse opinion: "DENIED. The *Reynolds Metals* case cited by petitioner confirms the prior denial of the petition." (A-52). Drawing reasonable inferences, it appears that the trial judge did not believe he was being furnished with any authority new and distinguishable from *Giza*, *supra*. It is not clear how he evaluated SPL's motion under Rule 59(e), whether he recognized that a new claim was being made, or whether he evaluated the motion pursuant to Rule 15.

But if the court had construed the "motion for reconsideration" as a motion to vacate the judgment in order to allow an amended complaint, then it should have been allowed. *Foman v. Davis*, 371 U.S. 178, 182 (1962). In the case cited, involving a will contest between a decedent's daughter and his second wife, the district court dismissed plaintiff's complaint to enforce

an oral contract not to make a will on December 19, 1960. On December 20, 1960, plaintiff filed a motion to vacate the judgment and to amend the complaint to assert a claim for *quantum meruit*. This was refused. In reversing, this Court said as follows:

> The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. *As appears from the record, the amendment would have done no more than state an alternative theory for recovery.*
>
> *Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.* See Generally, 3 Moore, Federal Practice (2d ed. 1948), §§15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but *outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.*
>
> The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion. It is so ordered.

Id., 371 U.S. at 182 (emphasis supplied). *Accord: United States v. Hougham*, 364 U.S. 310, 316-7 (1960); *Sweeney v. Keystone Provident Life Insurance Company*, 578 F.Supp. 31, 34 (D.Mass. 1983) ("A change in the legal theory of recovery is not

in itself grounds for refusing an amendment.") *See also Kiser v. General Electric Corp.*, 831 F.2d 423, 426-7 (3d Cir. 1987) (district court abused its discretion in not allowing an amendment to the complaint pursuant to Rule 15(a)).

Not only did SPL's "motion for reconsideration" set forth a new claim (*i.e.*, judicial review of agency action), it also set forth a new event which had not occurred as of the time the original application was filed. The new event was E.P.A.'s formal refusual to allow Dr. Spittler's deposition per the letter dated April 29, 1987. The new event implicates Rule 15(d) (supplemental pleadings) as well as Rule 15(a). *See United States v. Springer*, 491 F.2d 239, 241-2 (9th Cir. 1974) (supplemental pleading is authorized to include events occurring subsequent to the original pleading); *Lerman v. Chuckleberry Publishing, Inc.*, 521 F.Supp. 228, 231 (S.D. N.Y. 1981) (court should allow supplemental pleading under Rule 15(d) when it will promote a speedy disposition of the controversy, not cause undue delay, and not prejudice the rights of other parties).

The label "motion for reconsideration" should not control if the motion was in fact a motion to vacate judgment and amend the complaint within the meaning of Rule 15(a). *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978) ("The liberality of the Federal Rules is such that erroneous nomenclature does not prevent the court from recognizing the true nature of the motion."); *United States v. Belanger*, 598 F.Supp. 598, 601 (D.Me. 1984) ("The court should not hold a party to the label of its motion if relief is available under another provision of the rules.")

Only 7 days elapsed from the filing of SPL's original application to the filing of the "motion for reconsideration." This cannot be considered "undue delay" within the meaning of *Foman v. Davis*, *supra* at 182, especially since the agency action had not yet occurred when the original application was filed. Nor was there any "bad faith or dilatory motive" on the part of

SPL. *Id.* Nor were there any "repeated failure[s] to cure deficiencies by amendments previously allowed." *Id.*

The First Circuit sought to justify its holding by citing SPL's "lassitude" in delaying its request to E.P.A. for Dr. Spittler's deposition. 831 F.2d at 26 (A-7). We dispute this characterization, but assuming *arguendo* that SPL could have been more diligent, this "delay" was not of the type which results in unfair prejudice to the adverse party in litigation (E.P.A.). *See Sanders v. Clemco Industries*, 823 F.2d 214, 216-7 (8th Cir. 1987) (district court abused its discretion in not allowing amendment to complaint pursuant to Rule 15(a) in absence of showing of unfair prejudice to defendant due to delay); *Kiser v. General Electric Corp.*, *supra* at 428 (same). In this case, E.P.A. could not show prejudice to itself if an amendment had been allowed to SPL's original application. Indeed, E.P.A. never invoked any procedural or technical objection, but instead sought to have this controversy resolved on its merits.

II. THE DISTRICT COURT HAD JURISDICTION TO JUDICIALLY REVIEW AGENCY ACTION TAKEN PURSUANT TO AGENCY REGULATIONS WHEN THE ACTION WAS ALLEGED BY PETITIONER TO BE ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

The E.P.A. has regulations governing the extent to which its employees may testify in private lawsuits. 40 C.F.R. §§2.401 *et. seq.*, 50 Fed. Reg. 32386 (August 9, 1985) (A-14 to A-20). These regulations are clearly not a blanket proscription of E.P.A. employee testimony in private lawsuits. As the agency said in the preamble to the regulations:

> We recognize that there are situations were EPA should cooperate with Federal, State or local authorities as part of the Agency's joint responsibility for developing and enforcing environmental standards and other policies. This regulation does not preclude such activities, and numerous EPA officials are empowered to authorize such testimony.

50 Fed. Reg. 32386. Further, in explaining the "evils" which the agency expected would be avoided by the regulations, the summary to the preamble stated as follows:

> The intended effect of this regulation is to ensure that EPA employees' time is spent on EPA business and to avoid the appearance that EPA is taking sides in private litigation.

Id., 50 Fed. Reg. 32386. *See* 40 C.F.R. §2.401(c), 50 Fed. Reg. at 32387, incorporating these and other criteria into the regulation (A-18).

E.P.A. must clearly exercise discretion in deciding when it will permit its employees to testify in private lawsuits, but the agency's discretion in doing so is limited by the criteria set forth in the above-referenced regulations. It is well-settled that each federal agency is bound by its own regulations. *Service v. Dulles*, 354 U.S. 363, 372, 388 (1957) (discharge of foreign service officer held invalid due to failure of State Department to abide by ageney regulations). As this Court said in *Service v. Dulles*:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

Id., 354 U.S. at 388.

Federal judicial review of agency actions in applying federal law is available under 28 U.S.C. §1331. *Califano v. Sanders*, 430 U.S. 99, 104-107 (1976); *Chrysler Corp. v. Brown*, 441 U.S. 282, 317 (1979); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *reversed on other grounds*, 456 U.S. 728 (1982). Jurisdiction under §1331 is also available for judicial review of agency action taken pursuant to agency regulations. *Local 1219, American Federation of Government Employees v. Donovan*, 683 F.2d 511, 515-516 (D.C.

Cir. 1982); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d at 1139.

Of course, the availability of judicial review is subject to two exceptions, *i.e.* where "statutes preclude judicial review," and where "agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(1), (2); *Chrysler Corp. v. Brown*, *supra* at 317. The latter exception applies only "where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), quoting S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). Federal courts should not interpret a statute or regulation to confer unreviewable power to an administrative agency in the absence of a persuasive reason to believe that such was the purpose of Congress. *Morris v. Gressette*, 432 U.S. 491, 500-501 (1977); *Dunlop v. Bachowski*, 421 U.S. 560, 564 and n.5 (1975).

In the present case, there is no statute precluding judicial review. Also, the E.P.A. regulations are not drawn so broadly that it may be held as a matter of law that "agency action is committed to agency discretion by law." Definite standards for considering requests for testimony by agency employees are set forth in the regulations themselves, *e.g.* 40 C.F.R. §2.401(c), and in the preamble to the regulations. Since there is law to apply, and since there is no evidence that Congress intended E.P.A.'s exercise of discretion to be unreviewable, judicial review should clearly be available.

This court must decide whether the E.P.A. regulations themselves set forth sufficient standards which limit the agency's discretion, thereby affording judicial review under the APA.[4] It is submitted that the agency regulations clearly provide "judicially discernible limits," and judicial review is therefore available. *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d

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4. To the extent the First Circuit relied on the broad discretion conferred in the "housekeeping statute," 5 U.S.C. §301, *see* 831 F.2d at 25 (A-5), such reliance was misplaced. The agency action complained of in this case was ostensibly taken pursuant to agency regulations, not the "housekeeping statute." Accordingly, this court must look to the agency regulations. *Service v. Dulles*, *supra*.

29, 35-36 (3d Cir. 1976); *Local 1219, American Federation of Government Employees v. Donovan, supra* at 515-6.

In sum, the district court had jurisdiction under 28 U.S.C. §1331 and the APA. As was said in *Sheehan v. Army and Air Force Exchange Service, supra*, there is subject matter jurisdiction to decide this controversy, "and authority to award nonmonetary compensation flows from the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702." *Id.*, 619 F.2d at 1141. The two statutes together provide a waiver of sovereign immunity "for actions against federal government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." *Id.*, 619 F.2d at 1139.

[We add parenthetically that almost identical litigation is pending in the U.S. District Court for the Eastern District of Pennsylvania, *Davis Enterprises, Sun Pipe Line Company, et al. v. U.S. Environmental Protection Agency*, No. 87-5315. Plaintiffs in the *Davis Enterprises* case seek a videotape deposition of a second E.P.A. employee who works in Philadelphia and who was also involved in the air monitoring at the Newtown Crossing homes, including dates Dr. Spittler was not present. The case has been submitted to the district court in Philadelphia on cross-motions for summary judgment (filed January 15, 1988) and a stipulation of facts. The parties expect the district court to decide the jurisdictional claim, *i.e.*, whether judicial review is available, and, if so, whether the E.P.A.'s conduct in refusing permission for a deposition of an agency employee was in violation of the APA, 5 U.S.C. §706(2)(A). When a decision is rendered, it will be furnished to this Court.]

III. WHETHER THE E.P.A. ACTION WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW, WITHIN THE MEANING OF THE APA, IS A QUESTION WHICH NEEDS TO BE RESOLVED IN AN APPROPRIATE HEARING AT THE DISTRICT COURT LEVEL.

Judicial review under 5 U.S.C. §706(2)(A) to determine whether agency action was "arbitrary" or "capricious" requires the trial court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The standard of review for "abuse of discretion" is similar but not identical. *E.g.*, an abuse of discretion occurs when an agency departs from established policies. *Wong Wing Hang v. Immigration & Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1966), *cited in Citizens to Preserve Overton Park v. Volpe*, *supra* at 416.

In its "motion for reconsideration," SPL alleged that the E.P.A.'s refusal to permit a videotape deposition of Dr. Spittler was arbitrary, capricious and an abuse of discretion because his testimony would further the public interest and could not be misconstrued as taking sides in private litigation (A-40). SPL alleged that E.P.A. misapplied the criteria in its regulations. *Id.* A memorandum of law expanded upon these allegations (A-44 to A-51). In particular, SPL pointed out that the air monitoring results obtained by Dr. Spittler were not available from any other witness, that the evidence was relevant, and that Dr. Spittler would be testifying only as to what compounds were found and in what concentrations, not whether the levels were safe or toxic.

The trial court's terse denial of the "motion for reconsideration" gave no clue as to whether the court engaged in any analysis pursuant to the APA, 5 U.S.C. §706(2)(A). On the contrary, the inference must be that the court did no such thing. The court's ruling implied that the court did not believe it was being presented with any new authority for the requested relief.

The First Circuit engaged in an analysis of SPL's new claim for the limited purpose of evaluating whether the district court abused its discretion under Rule 59(e), pertaining to motions for reconsideration. 831 F.2d at 25 (A-6). The court of appeals thereby supplied a rationale for sustaining the district court's denial of the "motion for reconsideration" when there is no evidence that the district court itself had such a rationale.

In particular, the court of appeals chastised SPL for attaching certain addenda to its appellate brief. 831 F.2d at 25 (A-6). This referred to the fact that after the district court had denied the "motion for reconsideration," SPL made a Freedom Of Information Act request to E.P.A. for all documents evidencing decisions by the agency since August 1985 wherein the agency allowed testimony by its employees in litigation in which the United States was not a party. The documents furnished by E.P.A. showed numerous occasions where employee testimony was permitted in private litigation because it was relevant and despite no discernible agency interest. In bringing these instances to the attention of the First Circuit, SPL's appellate brief stated at p.23, n.16:

> We recognize that these materials were not before the District Judge in this case, but we do not expect E.P.A. to complain about citations to its own decisions and precedents which are matters of public record. However, if this Court deems it improper to consider these materials on appeal, it would still be appropriate to remand this case to the trial court for a hearing at which Addenda "B" through "BB" could be introduced into evidence.

E.P.A., in its brief to the First Circuit, did not object to the precedents on grounds that they were not before the district court. Instead, the agency sought to distinguish several of the cases and it argued that other decisions should not be applied as precedents.

The First Circuit's chastisement of SPL on this matter underscores the fact that the court fastened onto perceived procedural deficiencies and did everything it could to avoid

deciding the case on the merits. In doing so, the court subverted the purposes of the Federal Rules of Civil Procedure.

SPL's allegations in the "motion for reconsideration" called for a hearing of some kind. It is well-settled that a claim should not be dismissed unless the plaintiff can prove *no* set of facts which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Sun Pipe Line Company

March 21, 1988

APPENDIX

United States Court of Appeals
For the First Circuit

No. 87-1529

APPLICATION FOR ISSUANCE OF ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION

SUN PIPE LINE COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Garth,* *Senior Circuit Judge*,
and Selya, *Circuit Judge*.

Bruce J. Chasan with whom *Kenneth Scott, Wilson, Elser, Moskowitz, Edelman & Dicker, Richard D. Glovsky* and *Steven T. Sager* were on brief for appellant.

Charles J. Sheehan, Department of Justice, Land and Natural Resources Division, with whom *Martin W. Matzen*, Department of Justice, Land and Natural Resources Division, *Thomas E. Hookano*, Acting Assistant Attorney General, *Robert S. Mueller*, United States Attorney, and *Francis S. Blake*, General Counsel, Environmental Protection Agency, were on brief for appellee Environmental Protection Agency.

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* Of the Third Circuit, sitting by designation.

October 16, 1987

SELYA, *Circuit Judge*. This chameleon of a case comes before us in a considerably different posture than it originally assumed in the district court. Thus, we recount the factual predicate and evolution of the litigation with exacting care preliminary to our explanation of why we affirm the district court.

I

In November 1982, a gasoline pipeline near Newtown, Pennsylvania was accidentally punctured and a large quantity of fuel — perhaps as much as 100,000 gallons — escaped. Underground seepage and the spread of noxious fumes followed. In April 1983, a state agency, the Pennsylvania Department of Health, asked a federal official, Dr. Thomas Spittler,[1] to conduct air monitoring in the vicinity of the ruptured pipeline. He did so and reported the results to state health officials.

The next month, the oil leak spilled over into the local courts. Homeowners filed a class action suit against Sun Pipe Line Co. (Sun), appellant before us, claiming property damage and various adverse health effects. Several other related civil cases were subsequently filed. The state court eventually certified the class, bifurcated the class action suit, and tried the liability phase. A jury found Sun negligent. The court then designated representative plaintiffs and scheduled trial of their damage claims. In discovery which Sun initiated only after the liability verdict was in, it sought an admission of the truth and authenticity of Dr. Spittler's test results. But, the claimants refused.

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1. Dr. Spittler was then, and apparently still is, Chief, Technical Support Branch, Environmental Services Division, Region I Laboratory of the federal Environmental Protection Agency (EPA). Region I is headquartered in Massachusetts, thus explaining the appellant's choice of venue.

Little daunted, Sun then requested the EPA to allow Dr. Spittler to star in a videotaped deposition. The Pennsylvania court authorized the taking of the deposition, but never issued a subpoena or otherwise commanded the witness's appearance. Nevertheless, the appellant noticed the deposition without any means of assuring the witness's attendance and sued in the United States District Court for the District of Massachusetts for an order compelling the EPA to produce Dr. Spittler.[2] In the meantime, the agency spurned Sun's request, declining to deliver the witness.

After hearing, the district judge rained on Sun's parade. He denied the application in an *ore tenus* bench decision, essentially on the ground that the district court lacked authority to compel a federal employee like Spittler, in his official capacity, to respond to a state court subpoena.[3] Within a week, Sun abandoned its original theory of the case. It moved for reconsideration, focusing not on the production of Dr. Spittler's body, but on the propriety of EPA's administrative refusal to allow the deposition. In this motion, Sun argued for the first time that the agency action should be set aside as arbitrary and capricious. The district court abjured reconsideration and this appeal ensued.

II

Appellant's current theory of the case is grounded upon twin premises: (1) that EPA's decision not to permit Dr. Spittler to testify is subject to judicial oversight; and (2) that such scrutiny, if undertaken, will demonstrate the irrationality of the agency's action. The first of these premises implicates the coverage of the judicial review provisions of the Administrative

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2. The sole relief prayed for in the complaint was "an order requiring the Environmental Protection Agency to produce Dr. Thomas Spittler for a videotaped deposition." The complaint was never amended.

3. The district court, in so ruling, relied principally upon our decision in *Giza* v. *Secretary of HEW*, 628 F.2d 748, 751-52 (1st Cir. 1980). Given the gravamen of the appellant's case as it then stood, *Giza* was clearly controlling. *See generally United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

Procedure Act (APA), 5 U.S.C. §§701-706 (1983), and most particularly, the imperative of 5 U.S.C. §701(a). That section prevents judicial interference with agency actions under the APA to the extent that "statutes preclude judicial review," 5 U.S.C. §701(a)(1), or that such actions have been "committed to agency discretion by law." 5 U.S.C. §701(a)(2). The appellant's second premise involves whether the agency's declination to make Dr. Spittler available was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(a). This latter issue, of course, need not be addressed unless and until it has been determined that the §701(a) threshold has been crossed. *See Heckler* v. *Chaney*, 470 U.S. 821, 828 (1984). Because of the clumsy manner in which the instant appeal has been brought before us, we need not resolve even the first of these concerns.

When it filed suit in the district court, appellant wanted relief in the nature of mandamus — an order commanding the EPA to produce Dr. Spittler for the taking of a deposition. *See supra* n.2. Sun has since acknowledged that it had no entitlement to such an order. Its motion for reconsideration, in Sun's own words, "change[d] the thrust of its action in the district court so as to challenge EPA's refusal to permit the deposition on grounds that such action was violative of the APA, *i.e.*, that it was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." Appellant's Brief at 13.

Notwithstanding that Sun did not denominate any particular rule as the springboard for its reconsideration motion, it is settled in this circuit that a motion which asks the court to modify its earlier disposition of a case because of an allegedly erroneous legal result is brought under Fed. R. Civ. P. 59(e). *Silk* v. *Sandoval*, 435 F.2d 1266, 1267-68 (1st Cir.), *cert. denied*, 402 U.S. 1012 (1971). This comports with the weight of authority elsewhere. *See, e.g., Vreeken* v. *Davis*, 718 F.2d 343, 345-46 (10th Cir. 1983); *Miller* v. *Leavenworth-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378, 1380 (10th Cir. 1981); *United States Labor Party* v. *Oremus*, 619 F.2d 683, 687 (7th Cir. 1980); *Smith* v. *Hudson*, 600 F.2d 60, 62-63 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979); *Sonnenblick-Goldman Corp.* v.

Nowalk, 420 F.2d 858, 859 (3d Cir. 1970). Sun's motion for reconsideration served as a vehicle for suggesting a new and different legal theory as a means of undoing the original denial of relief — no more, no less. However ambiguous the motion may have been as to its provenance, the district court was entitled to scrutinize it under Rule 59(e). And appellate review must tread the same path.

III

This checkered procedural history brings us to what we see as the crux of the matter. Inasmuch as Sun's original initiative was concededly misguided, its present appeal must stand or fall on the propriety of the district court's rejection of the reconsideration motion. Correspondingly, the scope of our review extends only to the appropriateness of that denial — not to the fundamental correctness of the underlying judgment.

We have repeatedly held that, once the ball has ended, the district court has substantial discretion in deciding whether to strike up the band again in order to allow the losing party to argue new material or a new theory. *See Polyplastics, Inc.* v. *Transconex, Inc.*, No. 87-1134, slip op. at 12-13 n.4 (1st Cir. Sept. 3, 1987); *Willens* v. *University of Massachusetts*, 570 F.2d 403, 406 (1st Cir. 1978); *Pagan* v. *American Airlines, Inc.* 534 F.2d 990, 992-93 (1st Cir. 1976). Consequently, we will not overturn the trial court's decision on such a matter unless the appellant can persuade us that the refusal to grant the motion was a manifest abuse of discretion. *See id.* at 993. Whatever view may be taken of the underlying merits of the case, the abuse-of-discretion argument simply will not wash.

If, as the government contends, 5 U.S.C. §301 (1982)[4] so commits personnel deployment decisions (such as the EPA's withholding of Dr. Spittler) to the agency's unfettered discretion

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4. 5 U.S.C §301 provides in pertinent part that:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . .

— because the statute is "drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)) — then judicial review does not lie.[5] In that event, the district court had no discretion to abuse. Being bereft of jurisdiction, the court was duty bound to reject the requested reconsideration.

The flip side of the coin, however, presents no rosier a picture for the appellant. Sun's bedrock position is that, by adopting regulations governing the extent to which agency employees may testify in private litigation, *see* 40 C.F.R. §§ 2.401 *et. seq.*, EPA has constrained agency discretion in such a way as to make exercises of it judicially reviewable. If we were to assume *arguendo* that this were so, it would not stem the tide. After all, the appellant's request for Dr. Spittler's testimony did not conform to these regulations,[6] the complaint which Sun filed in this action contained no charge of arbitrariness, and the motion to reconsider — though it contained such a charge — offered precious little to substantiate it. In point of fact, the prime "evidence" on which Sun relies in its effort to establish an abuse of discretion comprises some two dozen addenda which it has cavalierly attached to its appellate brief — material which was never presented to the district court and which constitutes no proper part of the record on appeal. We cannot — and will not — consider such belated proffers. *See United States* v. *Kobrosky*, 711 F.2d 449, 457 (1st Cir. 1983) ("evidentiary matters not first presented to the district court are, as the

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5. We recognize that even actions "committed to agency discretion," 5 U.S.C. § 701(a)(2), may be subject to limited judicial review under special circumstances. *E.g., Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) (access to the court for constitutional challenges to administrative action not barred). But, Sun does not assert that any such exception applies in the circumstances of this case.

6. To offer but one example, under the regulations the requestor must state the nature of the envisioned testimony and "the reasons why the testimony would be in the interests of EPA." 40 C.F.R. § 2.403. The request letter which Sun forwarded on April 3, 1987 provided absolutely no hint of a clue of a suggestion of a reason why Dr. Spittler's proposed testimony would be in the agency's interest.

greenest of counsel should know, not properly before [an appellate court]"). So, even if there is some possible argument to be made for judicial oversight of EPA's alleged failure to abide by its own regulations governing the role of its personnel in private litigation — a matter as to which we initimate no opinion — there is no principled way in which the district court, in the circumstances of this case, can be said to have abused its discretion. Given what had transpired, the court was comfortably within its rights in refusing to take yet another look when the appellant belatedly shifted gears.

IV

We are aware that Sun — citing the press of the state court litigation — would have us sweep procedural niceties under the rug and reach the merits of its protean claim. But, jettisoning established rules to suit the fancy of individual litigants is not a step to be taken lightly under any circumstances. In this situation, it is not a step to be taken at all. Our canvass of the record indicates that any exigency which now obtains is largely of Sun's own invention.

We note, first, that no request for authentication of the test results under 40 C.F.R. § 2.406 has ever been tendered. Nor has Sun attempted to engage Dr. Spittler as a privately-retained expert. *See* 40 C.F.R. §§ 2.401(b)(3), (c). Moreover, the EPA official conducted his moniting in April 1983, and Sun was aware of the testing early on. The homeowners' litigation was instituted in May 1983. The record reflects that Sun's attorneys were in direct contact with Dr. Spittler no later than September 11, 1984 and obtained what the scientist called the "relevant parts" of his file no later than November 2, 1984. Nonetheless, Sun chose to wait until February 1987 before requesting the state plaintiffs to admit the authenticity and accuracy of the witness's report, and until April 1987 to ask the EPA to make him available. Even after the adverse verdict had been returned in the liability phase of the class action, Sun lingered in the clouds, motionless, for some four months. Having indulged in such lassitude, the appellant can scarcely be heard to complain that

established procedure should be discarded in order that it might extricate itself from a self-constructed box. If Sun has been hoist at all, it has been hoist with its own petard.

V

We need go no further. There are known hazards involved in changing horses in the middle of the stream. Sun's fall from the saddle and the consequent dousing of its late-mounted aspirations mirror those entirely predictable risks. We conclude that the district court, in denying the appellant's motion for reconsideration, did not misuse its discretion in any respect.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1529

APPLICATION FOR ISSUANCE OF ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION,

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SUN PIPE LINE COMPANY,
Appellant.

Before

CAMPBELL, *Chief Judge*,
GARTH, **Senior Circuit Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

ORDER OF COURT

Entered: November 20, 1987

The panel of judges that rendered the decision in this case, having voted to deny that the petition for rehearing and the suggestion for the holding of a rehearing en banc, having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be deined.

By the Court:

Francis P. Scigliano

Clerk.

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*OF THE THIRD CIRCUIT, SITTING BY DESIGNATION.

[cc: Messrs. Chasen and Sheehan]

Supreme Court of the United States

No. A-605

SUN PIPE LINE COMPANY,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 21, 1988.

s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 11th day of February, 1988.

STATUTES

5 U.S.C. § 701. Application; definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review therof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret consitutional and statutory provisions, and determine the meaning or applicablity of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(d) **Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 59. New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

32386 Federal Register / Vol. 50, No. 154 / Friday, August 9, 1985 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[FRL-2860-3]

Public Information; Testimony by Employees and Production of Documents in Civil Legal Proceedings

AGENCY: Environmental Protection Agency.
ACTION: Final rule.

SUMMARY: This rule revises 40 CFR Part 2, Public Information, to add a new Subpart C, Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States is not a Party. It generally provides that EPA employees may not officially appear as witnesses or produce documents in Federal, State or local proceedings, either voluntarily or in response to subpoenas, without the consent of the General Counsel or his designee. The intended effect of this regulation is to ensure that EPA employees' time is spent on EPA business and to avoid the appearance that EPA is taking sides in private litigation. Accordingly, employees may not appear as witnesses in their official capacities unless the appearance is approved as being clearly in the interests of EPA. This regulation does not apply to Congressional testimony.

EFFECTIVE DATE: This regulation is effective August 9, 1985.

FOR FURTHER INFORMATION CONTACT: Donnell L. Nantkes, (202) 382-4550.

ADDRESS: Office of General Counsel (LE-132G), Environmental Protection Agency, 401 M Street SW, Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION: EPA employees are frequently requested or subpoenaed to provide testimony or produce documents in litigation to which the United States is not a party. EPA employees are presently required to respond

to valid subpoenas, thereby preventing them from performing their duties and creating the appearance that the Agency is taking sides in private litigation. This regulation is intended to address this problem by prohibiting both voluntary appearances and compliance with subpoenas except where clearly in the interests of the Agency.

Subpoenas to testify concerning information which employees have acquired in the course of performing official duties, or to produce documents, are essentially legal actions against the United States as to which there has been no Congressional waiver of sovereign immunity. The courts have recognized the authority of Federal agencies to limit compliance with such subpoenas. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 482 (1951). Moreover, subpoenas by State courts or legislative committees which attempt to assert jurisdiction over Federal agencies are inconsistent with the supremacy clause of the U.S. Constitution, and a Federal regulation prohibiting compliance with such subpoenas reinforces this principle. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 318 (1819); *U.S.* v. *McLeod*, 385 F.2d 734 (5th Cir. 1987); *Giza* v. *Secretary of HEW*, 628 F.2d 748 (1st Cir., 1980); *Municipal Court* v. *Civiletti*, 172 Cal. Rptr. 83 at 86, 116 Cal. App., 3d 105 (1981).

Accordingly, this regulation prohibits EPA employees from complying with requests for production of documents or subpoenas from Federal and State courts and State or local legislative committees or administrative agencies without the approval of the General Counsel or his designee. (The Inspector General makes the necessary determinations regarding requests and subpoenas involving employees in the Office of Inspector General.)

We recognize that there are situations where EPA should cooperate with Federal, State or local authorities as part of the Agency's joint responsibility for developing and enforcing environmental standards and other policies. This regulation does not preclude such activities, and numerous EPA officials are empowered to authorize such testimony. The regulation also does not apply to Congressional proceedings.

While the regulation applies to information which employees acquire in the course of performing official duties, to production of documents in Agency files and to testimony concerning such document, it is recognized that there are situations where EPA employees may properly serve as expert witnesses on behalf of private parties in matters in which they have general expertise. Such situations are treated as outside employment under 40 CFR Part 3, Subpart E, and employees are required to obtain the written approval of their Deputy Ethics Officials and to perform such activities while in an annual leave status. In such cases, employees are required to state for the record that they are appearing as private individuals and that their testimony does not necessarily represent the official views of EPA.

* * * * *

Dated: August 5, 1985.
Lee M. Thomas,
Administrator.

PART 2—[AMENDED]

For the reasons set out in the preamble, Part 2. Chapter 1 of Title 40, Code of Federal Regulations, is amended as set forth below.

40 CFR Part 2 is amended by adding Subpart C to read as follows:

* * * * *

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States is Not a Party

Sec.

2.401 Scope and purpose.
2.402 Policy on presentation of testimony and production of documents.
2.403 Procedures when voluntary testimony is requested.
2.404 Procedures when an employee is subpoenaed.
2.405 Subpoenas duces tecum.
2.406 Requests for authenticated copies of EPA documents.

Authority: 5 U.S.C. 301; Reorganization Plan No. 3 of 1970, 5 U.S.C. App.; 33 U.S.C. 361(a); 42 U.S.C. 300j-9; 42 U.S.C. 6911a, 42 U.S.C. 7601(a).

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

§2.401 Scope and Purpose.

This subpart sets forth procedures to be followed when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. (In such cases, employees must state for the record that their testimony does not necessarily represent the official position of EPA. If they are called to state the official position of EPA, they should ascertain that position before appearing.) These procedures also apply to subpoenas *duces tecum* for any document in the possession of EPA and to requests for certification of copies of documents.

(a) These procedures apply to:

(1) State court proceedings (including grand jury proceedings);

(2) Federal civil proceedings, except where the United States, EPA or another Federal agency is a party; and

(3) State and local legislative and administrative proceedings.

(b) These procedures do not apply:

(1) To matters which are not related to EPA;

(2) To Congressional requests or subpoenas for testimony or documents;

(3) Where employees provide expert witness services as approved outside activities in accordance with 40 CFR Part 3. Subpart E (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA);

(4) Where employees voluntarily testify as private citizens with respect to environmental matters (in such cases employees

must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA).

(c) The purpose of this Subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

§2.402 Policy of presentation of testimony and production of documents.

(a) With the approval of the cognizant Assistant Administrator, Office Director, Staff Office Director or Regional Administrator or his designee, EPA employees (as defined in 40 CFR 3.102 (a) and (b)) may testify at the request of another Federal agency, or, where it is in the interests of EPA, at the request of a State or local government or State legislative committee.

(b) Except as permitted by paragraph (a) of this section, no EPA employee may provide testimony or produce documents in any proceeding to which this Subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee under §§2.403 through 2.406.

§2.403 Procedures when voluntary testimony is requested.

A request for testimony by an EPA employee under §2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case

of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

§2.404 Procedures when an employee is subpoenaed.

(a) Copies of subpoenas must immediately be sent to the General Counsel or his designee with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director, determines whether compliance with the subpoena would clearly be in the interests of EPA and responds as soon as praticable.

(b) If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn), produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

(c) Where employees in the Office of Inspector General are subpoenaed, the Inspector General or his designee makes the determination under paragraphs (a) and (b) of this section in consultation with the General Counsel.

(d) The General Counsel will request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Agency and the employee.

§2.405 Subpoena duces tecum.

Subpoenas *duces tecum* for documents or other materials are treated the same as subpoenas for testimony. Unless the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director (or, as to employees in the Office of Inspector General, the Inspector General) determines that

compliance with the subpoena is clearly in the interests of EPA, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn) and respectfully refuse to produce the subpoenaed materials. However, where a subpoena *duces tecum* is essentially a written request for documents, the requested documents will be provided or denied in accordance with Subparts A and B of this Part where approval to respond to the subpoena has not been granted.

§2.406 Requests for authenticated copies of EPA documents.

Requests for authenticated copies of EPA documents for purposes of admissibility under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents which would otherwise be released pursuant to Subpart A. For purposes of Rule 44 the "person having legal custody of the record" is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director or his designee. The advice of the Office of General Counsel should be obtained concerning the proper form of authentication.

[FR Doc. 85-18938 Filed 8-8-85; 8:45; am]
BILLING CODE C540-60-M

WILSON ELSER, MOSKOWITZ, EDELMAN & DICKER
BY: K. SCOTT/B. CHASAN
ATTORNEY FOR: SUN PIPE LINE COMPANY
IDENTIFICATION NO. 31821/29227
1811 CHESTNUT STREET
PHILADELPHIA, PA 19103
(215) 563-5600

JOSEPH HUDACHEK, et al.	:	COURT OF COMMON PLEAS
Plaintiffs	:	BUCKS COUNTY
	:	
v.	:	
	:	
SUN COMPANY, INC., et al.,	:	NO. 84-01113-11-2
Defendants	:	

SUN PIPE LINE COMPANY'S REQUESTS FOR ADMISSIONS TO PLAINTIFFS (FEBRUARY 20, 1987) AND ANSWERS THERETO

TO: Joseph, Diane and Jason Hudachek
c/o Paul R. Beckert, Jr., Esquire, P.C.
634 Bristol Pike
Suite 200
Bensalem, PA 19020

Pursuant to Pennsylvania Rules of Civil Procedure 4014, you are hereby requested to admit within thirty (30) days of service hereof, for purposes of this action only, the truth of the following facts and opinions:

* * * *

2. (a) On April 6, 1983, the Enviromental Protection Agency sampled both the Hudachek home (kitchen and basement) and outside ambient air in Newtown Crossing, with a field gas chromatograph and obtained the following results reported in the April 19, 1983 letter from Theodore C. Erdman to Gary A. Schultz, Attachment "B": Hudachek Kitchen and Basement: Interference from solvent used in

home; outside air sample I: 5 ppb benzene and 7 ppb toluene; outside air sample II: 6 ppb benzene and 3 ppb toluene.

[Answer] It is admitted only that the letters are authentic. Plaintiffs are not able to admit that those records are accurate, how the tests were conducted, the manner of interpretation of the tests or the accuracy of the results, which are specifically denied.

(b) The parts per billion (ppb) of benzene and toluene and other results reported in Mr. Erdman's April 19, 1983 letter (and above) are true and correct results.

[Answer] It has been specifically admitted that the April 19, 1983 letter is authentic. Plaintiffs do not admit the accuracy of the records, the manner of the testing, the manner of interpretation or the contents thereof as other than being a recitation of what is stated in the letter without an admission of their accuracy or verification thereof.

3. (a) On April 7, 1983, the Environmental Protection Agency sampled in home air in the Hudachek home (kitchen) in Newtown Crossing, and obtained the following results reported in the May 10, 1983 letter from Theodore C. Erdman to Gary A. Schultz, Attachment "C":

EPA Region I Laboratory:	Benzene 3 ppb Toluene 1 ppb Xylenes 10 ppb 1,1,1-Tri chloroethane 670 ppb Methylene Chloride 8 ppb
City of Philadelphia Laboratory	Benzene 2 ppb Toluene 15 ppb Xylenes 3 ppb

[Answer] Denied as stated. Plaintiffs incorporate by reference the answers to paragraphs 2(a) and 2(b) of the Requests for Admissions. As to each of the letters, the letter is admitted to be authentic. The underlying results set forth in the letters are not admitted to be accurate for the reason that plaintiffs have no knowledge of or control over the manner of the testing, the manner of interpretation, the accuracy of the results as obtained, or any other such matters.

(b) The parts per billion (ppb) of the compounds listed above (taken from Mr. Erdman's April 19, 1983 letter) are true and correct results.

[Answer] Denied as stated. Plaintiffs incorporate by reference the denial set forth in paragraphs 2(a), 2(b) and 2(c) as fully as though set forth herein at length. It is admitted that the letter itself is authentic.

* * * *

VERIFICATION

I hereby verify that the statements made in the within are true and correct upon my personal knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

s/ Diane S. Hudachek

DIANE HUDACHEK

DATED: MARCH , 1987

ATTACHMENT "B"

REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

April 19, 1983

Mr. Gary Schultz
State of Pa. Health Dept.
625 Cherry Street
Reading, PA 19602

Dear Mr. Schultz:

Provided below are the results of the sampling performed on 3-25-83, 4-6-83, and 4/7/83 in homes in the Newtown Crossing subdivision, Bucks County, Pa.

The homes tested are identified by names of homeowners which are listed on the attached map (prepared by Sun Pipeline Company).

* * * *

4-6-83

The purpose of this sampling was to collect benzene and toluene measurements in the living space. Of the seven homes affected by the spill, 6 were tested. The Sutton home will be tested on 4-25-83.

A field gas chromatograph was used with a minimum sensitivity for benzene of 1 part per billion and for toluene of 2 parts per billion.

Samples were taken in the kitchen of each home, and in the basement of 4 of 6 homes.

Stevenson	Kitchen	14	53
	Basement	13	46
Melso	Kitchen	8	24
Hudachek	Kitchen	Interference from	
	Basement	solvent used in home	
Marr	Kitchen	Interference	25
	Basement	Interference	21
Jacobs	Kitchen	5	19
Leipholtz	Kitchen	Interference	41
	Basement	4	39

Samples were run of air (ambient air) outside of the homes. Two typical results for benzene and toluene levels are provided below.

Outside Air	PPB Benzene	Toluene
	5	7
	6	3

4-7-83

Samples were collected for subsequent analysis by the City of Philadelphia Health Department and EPA Region I Laboratory, Lexington, Mass. At this time only partial results are available.

They are analyzing for benzene, toluene, xylene and dibromo ethane (ethylene bromide). The bromide compound is a gasoline additive. Only preliminary results for benzene are available. Only the Stevenson and Hudachek homes were sampled.

Stevenson — Benzene 20 ppb

Hudachek — Benzene 2 ppb

Additional monitoring is planned for the period of April 25 - May 7. Samples will be collected after the ground is soaked by heavy rain; this is when levels of vapors entering the homes are expected to be the highest.

The homes that will be sampled are listed below:

1. Stevenson
2. Hudachek
3. Marr
4. Jacobs
5. Melso
6. Leipholtz
7. Glover
8. Sutton

Feel free to call Mr. Robert Kramer, or me if you have questions (215) 596-9318.

Sincerely yours,

s/ Theodore C. Erdman

Theodore C. Erdman
Air Monitoring Section
Environmental Services Division

[attached map omitted]

ATTACHMENT "C"

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

Mr. Gary A. Schultz
Pennsylvania Dept. of Health
625 Cherry Street
Reading, PA 19602

May 10, 1983

Dear Mr. Schultz:

The City of Philadelphia Health Department, and EPA Region I Laboratory, Lexington, Massachusetts have analyzed samples for organic vapors which were collected on 4-7-83 within 2 homes of the Newtown Crossing subdivision, Bucks County. The samples were collected in the kitchens of the _____ and Hudachek homes. Attached is a table that lists the results of the analyses.

The Laboratory results (1) confirmed the measurements for benzene and toluene collected on 4-6-83 using a field gas chromatograph, (2) provide estimates of the vapor concentration of additional compounds of interest (xylene, ethylene bromide, tetramethyl/ethyl lead), (3) and demonstrates the proficiency of the City of Philadelphia Laboratory. The City is analyzing the samples collected on 4-25-83 at 9 homes affected by the gasoline vapors.

The results of the 4-25-83 sampling of 9 homes will be available in about 10 days. The samples were collected after heavy rain on 4-24 had saturated the ground. After heavy rain the levels of gasoline vapors entering the homes are expected to be the highest.

The survey of 4-25-83 completes our plans for monitoring organic vapors levels in homes affected by the November 12, 1982 gasoline spill. Let me know if you or Center for Disease Control, Atlanta, need additional measurements.

Sincerely yours,

s/ Theodore C. Erdman

Theodore C. Erdman
Air Monitoring Section
Environmental Services Division

Date of Sampling	Sampling Location	Analyst	Compound	Concentration PPB
4-6-83	_____ Kitchen	EPA Region I on site gas chromatograph	Benzene	14
			Toluene	53
4-7-83	_____ Kitchen	EPA Region I Laboratory	Benzene	25
			Toluene	42
			Ethyl benzene	10
			Xylenes	28
			Ethylene bromide	ND
			Tetraethyl lead	ND
4-7-83	_____ Kitchen	City of Philadelphia Laboratory	Benzene	20
			Toluene	30
			Xylenes	26
4-6-83	Hudachek Kitchen	EPA Region I on site gas chromatograph	Benzene	Interference*
			Toluene	Interference
4-7-83	Hudachek Kitchen	EPA Region I Laboratory	Benzene	3
			Toluene	1
			Xylenes	10
			1,2 Dichloroethane*	200
			1,1,1 Trichloroethane	670
			Methylene chloride	8
			Ethylene bromide	ND
			Tetraethyl lead	ND
4-7-83	Hudachek Kitchen	City of Philadelphia Laboratory	Benzene	2
			Toluene	15
			Xylenes	3

ND = None Detected
PPB = Parts Per Billion
* The chlorinated solvent vapors found in the home probably resulted from the recent use of mastic adhesive used to cement tile in the kitchen. The mastic contained chlorinated solvents.

Wilson, Elser, Moskowitz, Edelman & Dicker
1811 Chestnut Street
Philadelphia, PA 19103
Telephone: (215) 563-5600

April 3, 1987

Donnell L. Nantkes, Esquire
Office of General Counsel
Environmental Protection Agency
401 N Street, S.W.
Washington, D.C. 20460

FEDERAL EXPRESS

RE: Air Monitoring by Dr. Thomas Spittler
Director, U.S. E.P.A. Region I Laboratory

Dear Mr. Nantkes:

This law office represents Sun Pipe Line Company in the case of *Joseph Hudachek, et. ux. v. Sun Pipe Line Company, et. al.*, to be tried on May 11, 1987, in the Bucks County, Pennsylvania, Court of Common Pleas. The case involves a pipeline accident that occurred on November 12, 1982, when a cable television company punctured a pipeline operated by Sun in Newtown, Pennsylvania. Approximately 100,000 gallons of unleaded gasoline escaped from the pipeline, slightly over half of which was recovered at the scene. The remaining gasoline filtered its way underground and allegedly adversely affected a nearby housing community. The Hudachek family formerly resided in that community, but they abandoned their home due to gasoline allegedly entering the home.

Dr. Thomas M. Spittler, Director of the United States Environmental Protection Agency Region I Laboratory, conducted air monitoring in the Hudachek residence with a portable chromatography machine. The results of the monitoring are in the attached correspondence.

Mr. Donnell L. Nantkes
April 3, 1987
Page Two

During pretrial proceedings, Sun Pipe Line Company submitted Requests for Admissions to the Hudacheks requesting that they admit the authenticity and accuracy of the air monitoring results conducted by Dr. Spittler. Unfortunately, they have refused to do so. It is for this reason that we find it necessary to depose Dr. Spittler on those issues. We have spoken with Dr. Spittler on several occasions and he has been very cooperative regarding our inquiries. We do not anticipate his deposition lasting more than 1 to 2 hours and we will be more than happy to travel to Dr. Spittler's office in Waltham, Massachusetts or Boston in an effort to minimize any inconvenience to him and to the Environmental Protection Agency.

Of course, we will comply with all reasonable procedures required by the Environmental Protection Agency in arranging Dr. Spittler's deposition. Also, we certainly have no objection to having counsel for the Environmental Protection Agency present during the deposition.

Unfortunately, Sun Pipe Line Company has been forced into taking Dr. Spittler's deposition by the position taken by the Hudacheks in their pending lawsuit as explained above. Having no alternative, we request that the Environmental Protection Agency agree to our request for 1 to 2 hours of Dr. Spittler's time for a deposition in Waltham or Boston regarding the air monitoring performed by him in Newtown, Pennsylvania in the Hudachek residence.

Very truly yours,

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER

s/ BUTLER BUCHANAN, III

BUTLER BUCHANAN, III

BB/dya
Enclosure
cc: Dr. Thomas N. Spittler

[exhibits to letter omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

APPLICATION FOR ISSUANCE OF ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION	MBD #87-318

Petitioner, Sun Pipe Line Company, by its attorneys, the Law Offices of Richard D. Glovsky, and Wilson, Elser, Moskowitz, Edelman & Dicker, hereby petitions the United States District Court for the District of Massachusetts as follows:

(1) The petitioner, Sun Pipe Line Company, is currently a defendant in the actions:

* *Joseph Hudachek, et al v. Sun Company, Inc., et al*, Civil Action — Law No. 84-01113-11-2 (Court of Common Pleas, Bucks County, PA);

* *Cipriani, et al v. Sun Company, Inc., et al*, Civil Action — Law No. 83-03557-11-2 (Court of Pleas, Bucks County, PA);

* *William L. Stevenson and Margaret M. Stevenson, h/w, et al v. Sun Company, Inc., et al*, Civil Action — Law No. 84-005726-11-2 (Court of Common Pleas, Bucks County, PA);

* *Douglas St. John, et al v. Sun Company, Inc., et al*, Civil Action — Law No. 84-06412-11-2 (Court of Common Pleas, Bucks County, PA).

(2) These actions arose as a result of an accident which occurred when a cable television company punctured a pipeline

operated by Sun Pipe Line Company in Newtown, Pennsylvania, thereby releasing approximately 100,000 gallons of gasoline.

(3) On April 3, 1987, petitioner's counsel wrote to Donnell L. Nantkes, Esquire, Office of General Counsel, Environmental Protection Agency, Washington, D.C., requesting to take Dr. Spittler's deposition in his office at his convenience for no more than one to two hours (a copy of the letter is attached hereto and labelled Exhibit A).

(4) In its letter, petitioner's counsel explained that Dr. Spittler had conducted air monitoring tests in the Hudacheck's residence and that during pre-trial proceedings in the above-captioned cases, the Hudachecks refused to admit the accuracy of the air monitoring results conducted by Dr. Spittler (a copy of the Sun Pipe Line Company's Requests for Admissions to Plaintiffs (February 20, 1987) And Answers Thereto are attached and labelled Exhibit B). Petitioner's request was forwarded to Region I, EPA, Office of Regional Counsel.

(5) The aforementioned cases are scheduled for trial on May 11, 1987.

(6) The Environmental Protection Agency has not indicated whether or not Dr. Spittler will honor petitioner's request.

(7) On April 23, 1987, a commission was issued out of the Court of Common Pleas of Bucks County, Pennsylvania, authorizing Sun Pipe Line Company to take the deposition of Dr. Thomas Spittler, Ph.D., Director, U.S. E.P.A., Region I Laboratory, 60 Westview Street, Lexington, MA 02173 (copy of commission is attached and labelled Exhibit C).

(8) A deposition notice has been served (a copy is attached and labelled Exhibit D).

WHEREFORE, petitioner prays that the Court enter an order requiring the Environmental Protection Agency to produce Dr. Thomas Spittler for a videotaped deposition to occur at 10:00 o'clock a.m. on Wednesday, May 6, 1987 at the Law Offices of Richard D. Glovsky, 31 Milk Street, Suite 810, Boston, MA 02109.

SUN PIPE LINE COMPANY,
Petitioner

By Its Attorneys,

LAW OFFICES OF RICHARD D. GLOVSKY

By: /s/ Richard D. Glovsky
Richard D. Glovsky
31 Milk St., Suite 810
Boston, MA 02109
(617) 423-7100

and

Wilson, Elser, Moskowitz, Edelman & Dicker

By: /s/ Bruce J. Chasan
Bruce J. Chasan
1811 Chestnut Street
Philadelphia, PA 19103
(215) 563-5600

[exhibits and certificate of service omitted]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J. F. KENNEDY FEDERAL BUILDING,
BOSTON, MASSACHUSETTS 02203

April 29, 1987

Mr. Butler Buchanan, III
Wilson, Elser & Morkowitz,
Edelman & Dicker
1811 Chestnut Street
Philadelphia, PA 19103

Re: Request for Deposition of Dr. Thomas Spittler

Dear Mr. Buchanan:

This letter is in reponse to your letter, dated April 3, 1987, to Donnell Nantkes, Office of General Counsel requesting the deposition of Dr. Thomas Spittler, an employee in the Environmental Services Division, Region I, U.S. Environmental Protection Agency.

A request of this nature is governed by the regulation found at 40 C.F.R., Part 2, Subpart C. The purpose of these regulations is to assure that EPA employees official time is used for official purposes.

Pursuant to 40 C.F.R. §2.403, EPA employees may testify in private litigation only under circumstances where the Regional Counsel determines that compliance with such a request would clearly be in the interest of EPA. Unfortunately, after consultation with Mr. Spittler's supervisor and the Regional Administrator, I have determined that your request is not clearly in the interest of EPA. Accordingly, your request is hereby denied.

Should you have any questions with respect to this matter, please contact James T. Owens, III, Senior Assistant Regional Counsel at (617) 565-3325.

Sincerely,

/s/ Pat Parenteau
Patrick A. Parenteau
Regional Counsel

cc: Donnell Nantkes, OGC
Richard Glovsky, Esq.
31 Milk Street
Suite 810
Boston, MA 02109

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: APPLICATION FOR ISSUANCE OF ORDER REGARDING ENVIRONMENTAL PROTECTION AGENCY	:	MBD No. 87-318

BEFORE THE HONORABLE WALTER JAY SKINNER
United States District Judge

Courtroom 6
U.S.P.O. & Courthouse
Boston, Massachusetts

April 30, 1987

APPEARANCES

For the EPA:
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For the Sun Pipeline Company:
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DEBORAH MEEKS, Official Court Reporter, U.S. District Court, 204 USPO & Courthouse, Boston, MA 02109, (617) 338-8439, Computer-aided Transcription

PROCEEDINGS [2:25 p.m.]

THE CLERK: MBD 87-318, In Re Application for Issuance of Order Regarding the U.S. Environmental Protection Agency.

THE COURT: See you at the side bar.

AT THE BENCH

MR. GLOVSKY: Richard Glovsky. I present Sun Pipeline.

MR. HOGELAND: Andrew Hogeland representing the EPA. To try to keep it short, if we can, it's the Government's view that the area is controlled by *Giza v. Secretary of HEW*. A copy of that is attached to the brief we filed about an hour ago. We just got notice of the action—

THE COURT: I've read it.

MR. HOGELAND: Briefly, *Giza* makes it clear that the Federal Court does not have authority to enforce even a state court subpoena if it's issued. In this case, there's been no subpoena issued nor apparently, either, one applied for.

THE COURT: I thought there was a subpoena issued in Pennsylvania?

MR. HOGELAND: No, There's a notice of deposition filed and there's a commission issued to a court reporter to appear authorizing the court reporter to take the deposition.

THE COURT: A subpoena out of the District Court in Pennsylvania would have no effect up here?

MR. HOGELAND: Well, It—two answers. First, it doesn't have an effect here because there's no authority for this Court to enforce it. There may be matters in state court where the Massachusetts state court would enforce the Pennsylvania state court subpoena if there was one. But there isn't, so we think it should be denied.

THE COURT: Certainly the Federal Court has the authority to enforce a deposition where the Witness is.

MR. HOGELAND: Well, if the case is pending in another Federal District Court and the subpoena issues out there, they apply to this Court that issues a pursuant order, that's correct. The way it appears, though, is a state court who hasn't even issued a subpoena.

THE COURT: Was it in the state court.

MR. HOGELAND: It still is. And the *Giza* First Circuit case is the same. In fact, that was a Massachusetts state court case and the Court of Appeals upheld a denial of the District Court's enforcement.

THE COURT: You say you've attached that?

MR. HOGELAND: Yes. It's here. And that's been followed by Judge Keeton in another opinion I have.

MR. GLOVSKY: That case has no bearing in this context.

THE COURT: What do you say about the *Giza* case?

MR. GLOVSKY: I think it's contradicted, your Honor, by the EPA'S own regulations that say you have to come to Federal Court to support a subpoena. And those regulations are also attached. If your Honor please, we're—

THE COURT: You mean these here?

MR. GLOVSKY: Yes, it's—in fact, I have a copy for the Court.

Your Honor, we're only asking for the testimony that will go for one hour and we'll do it at his convenience, wherever—

THE COURT: Well, I'd help you if I had the authority to do it. But the First Circuit seems to think that I don't have the authority to do it.

MR. GLOVSKY: They're saying there's no subpoena. In that case, your Honor, we could get a subpoena and we'd be right back here tomorrow.

THE COURT: I don't think that's the issue. See, this regulation says that employees are prohibited from complying with the requests for production for subpoenas and to appear outside of matters that are not within the EPA, but that's not—you want this man because--

MR. GLOVSKY: Because he went down to Pennsylvania to, as an EPA employee.

THE COURT: So, I don't see how you, how does this help you at all?

MR. GLOVSKY: Well, I think it suggests that you have to come to Federal Court if you're going to compel the testimony.

THE COURT: But it also suggests that if you do come to Federal Court, you're not going to get it.

MR. GLOVSKY: Well, the regs provide that the agency can permit the testimony if they feel in their discretion it's appropriate.

THE COURT: Well, I can't order them to exercise their discretion.

MR. GLOVSKY: Well, I think if a reasonably fashioned mandamus—

THE COURT: If it's discretionary, it's discretionary. And if it's discretionary, almost by hypothesis, it's not subject to mandamus. Mandamus is reserved for ministerial acts.

MR. GLOVSKY: Well, in this situation, Judge, we're only asking for one hour of this man's time. I think that's quite ministerial.

THE COURT: I would give you the hour if I had the authority. But I read this case as saying I don't have the authority and, therefore, I have to advise you with regret that—

MR. GLOVKSY: May I do this, Judge, because I just received these papers? If I can come back with some authority, may I come back to see the Court on this?

THE COURT: Well, frankly, you can come in to ask for something, you ought to have your authority.

MR. GLOVSKY: I thought we did in the regulation.

THE COURT: Well, you're wrong.

MR. GLOVSKY: I'm not always right.

THE COURT: I think the best thing to do is see if you can talk him into it. Because it doesn't look to me as if you're going to get very far with your petition.

MR. GLOVSKY: Can I have a day to review the case?

THE COURT: Well, if you want to move for reconsideration, you can certainly do so, but I'm going to deny this now.

MR. HOGELAND: Thank you.

MR. GLOVSKY: Thank you, Judge.

THE CLERK: It won't be you tomorrow, Judge.

THE COURT: It won't be my problem tomorrow. You get a crack at—

MR. GLOVSKY: Who do I get tomorrow?

THE COURT: — some more reasonable person.

MR. HOGELAND: There are none.

MR. GLOVSKY: Thank you for giving us the time.

MR. HOGELAND: Good afternon.

(Adjourned at 2:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPLICATION FOR ISSUANCE OR ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION	MBD#87-318

MOTION FOR RECONSIDERATION OF ORDER DENYING THE PETITION OF SUN PIPE LINE COMPANY TO REQUIRE THE ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER FOR A VIDEOTAPE DEPOSITION

Petitioner, Sun Pipe Line Company ("SPL"), by its attorneys, the law offices of Richard D. Glovsky, and Wilson, Elser, Moskowitz, Edelman & Dicker, hereby moves for reconsideration of this Court's Order of April 30, 1987, denying petitioner's application for an order requiring the Environmental Protection Agency (EPA) to produce Dr. Thomas Spittler to testify by videotape deposition. In support of this Motion for Reconsideration, petitioner avers as follows:

1. All averments in SPL's original application filed on April 29, 1987 are realleged and incorporated herein by reference.

2. The EPA filed its opposition to SPL's original application on April 30, 1987.

3. At the hearing before this Honorable Court on April 30, 1987, the court sustained EPA's position mainly on the authority of *Giza v. Secretary of HEW*, 628 F.2d 748 (1st Cir. 1980). See copy of transcript attached hereto.

4. Petitioner believes the holding of *Giza v. Secretary of HEW*, *supra*, is inapposite in the factual circumstances here, and desires to present further argument distinguishing it.

5. Petitioner would characterize this proceeding as an action for judicial review of agency action which it contends is arbitrary, capricious and an abuse of discretion. In particular, the action of the EPA Regional Counsel in refusing to permit the videotape deposition of Dr. Thomas Spittler is the agency action complained of.

6. This court has authority to review a federal agency's exercise of discretion in refusing to permit deposition testimony by an agency employee. *Reynolds Metals Company v. Crowther*, 572 F.Supp. 288, 291 (D. Mass. 1983).

7. The action of the EPA Regional Counsel in refusing to permit Dr. Spittler's videotape deposition was an abuse of discretion because (1) such testimony by Dr. Spittler would indeed further the public interest, as it would pertain to matters closely connected with EPA business, and (2) such testimony, in the circumstances here, cannot be misconstrued as taking sides in private litigation. For these reasons, which will be expanded upon in the attached Memorandum of Law, it is clear that the EPA Regional Counsel abused his discretion in applying the criteria of 40 C.F.R. §§2.401 *et seq.*, 50 Fed. Reg. 32387 (August 9, 1985).

WHEREFORE, it is respectfully prayed that this Honorable Court will reverse its prior ruling and order the EPA Regional Counsel to permit the videotape deposition.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPLICATION FOR ISSUANCE OF ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION	:	MBD #87-318

AFFIDAVIT OF COUNSEL

FOR SUN PIPE LINE COMPANY

City of Philadelphia

— ss:

Commonwealth of Pennsylvania

BRUCE J. CHASAN, being duly sworn, deposes and says as follows:

1. I am the attorney of the record for Sun Pipe Line Company, a Pennsylvania corporation, in numerous cases presently pending in the Court of Common Pleas for Bucks County, PA.

2. All factual averments in the attached Motion For Reconsideration Of Order Denying The Petition Of Sun Pipe Line Company To Require The Environmental Protection Agency To Produce Dr. Thomas Spittler For A Videotape Deposition, and all factual averments in the

accompanying memorandum of law in support thereof, are true and correct to the best of my knowledge, information and belief.

s/ Bruce J. Chasan

BRUCE J. CHASAN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 4th
DAY OF MAY, 1987.

s/ Veronica A. Love-Myers

NOTARY PUBLIC
VERONICA A. LOVE-MYERS
Notary Public, Phila., Phila. Co.
My Commission Expires Oct. 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPLICATION FOR ISSUANCE OF ORDER REQUIRING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER TO TESTIFY BY VIDEOTAPE DEPOSITION	:	MBD #87-318

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING THE PETITION OF SUN PIPE LINE COMPANY TO REQUIRE THE ENVIRONMENTAL PROTECTION AGENCY TO PRODUCE DR. THOMAS SPITTLER FOR A VIDEOTAPE DEPOSITION

INTRODUCTION

The Environmental Protection Agency (EPA) has regulations governing the extent to which its employees may testify in private lawsuits. 40 C.F.R. §§2.401 *et seq*., 50 Fed. Reg. 32386 (August 9, 1985). These regulations are clearly not a blanket proscription of EPA employee testimony in private lawsuits. As the agency said in the preamble to the regulations:

> We recognize that there are situations where EPA should cooperate with Federal, State or local authorities as part of the Agency's joint responsibility for developing and enforcing environmental standards and other policies. This regulation does not preclude such activities, and numerous EPA officials are empowered to authorize such testimony.

50 Fed. Reg. 32386. Further, in explaining the "evils" which the agency expected would be avoided by the regulations, the preamble stated as follows:

> The intended effect of this regulation is to ensure that EPA employees' time is spent on EPA business and to avoid the appearance that EPA is taking sides in private litigation.

Id., 50 Fed. Reg. 32386. *See also*, 40 C.F.R. §2.401(c), 50 Fed. Reg. at 32387.

Clearly EPA must exercise discretion in deciding when it will permit its employees to testify in private lawsuits, and that discretion is clearly subject to judicial review. *Reynolds Metals Company v. Crowther*, 572 F.Supp. 288, 291 (D. Mass. 1983) ("The narrow basis of this court's decision clearly does not preclude appropriate judicial supervision of a department's exercise of discretion to prohibit testimony by its employees.")

Under the facts presented in this matter, it is clear that the EPA became involved in the aftermath of the Newtown, PA pipeline accident to develop valid data which could be used by state, local and federal authorities to develop health criteria. EPA itself was not concerned with setting any standards, and it did not do so. Dr.Spittler's testimony is desired for the purpose of establishing the validity of certain measurements he made in 1983 in individual homes.[1] This is a mere extension of the work he did in 1983, and it clearly remains a matter of public interest. There is very little risk of any appearance that Dr. Spittler's testimony will tend to favor one party or another. Furthermore, the time involved (an estimated 1 to 2 hours for a videotape deposition) is *de minimus* in light of the substantial manpower that EPA has already devoted to the air monitoring work it did in Newtown, PA.

FACTUAL BACKGROUND

SPL's petroleum pipeline was punctured by a cable television contractor in Newtown Township, PA on November 12, 1982. Approximately 50,000 gallons of unleaded gasoline was

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1. Dr. Spittler will not be asked to give opinions as to whether the levels he found were safe or toxic. The parties in the Pennsylvania litigation have industrial hygienists, toxicologists, and medical doctors to render those types of expert opinions. However, Dr. Spittler's expertise as a chemist is relevant to show his competence to make valid, reliable measurements.

lost to the soil. In the ensuing months, residents of Newtown Crossing, a housing subdivision adjacent to the site of the accident, began complaining of gasoline vapors entering their homes through their basement sumps. Angry homeowners began to attribute various adverse health symptoms to exposure to gasoline vapors. SPL hired an industrial hygienist (Stewart-Todd Associates, Inc.) to do charcoal tube air monitoring in various residences to measure the levels of hydrocarbons present. The first samples were obtained on March 9, 1983, and the results were discussed on March 21, 1983 at a public meeting of the Newtown Township Supervisors. SPL was represented by various corporate employees and the corporate medical director. Mr. Gary Schultz of the Pennsylvania Department of Health was present. Numerous affected homeowners were also in attendance. An excerpt from the transcript (pp. 102-113) is attached hereto as Exhibit "A." As can be seen, Mr. Schultz stated that the Pennsylvania Department of Health would not do any air monitoring, but the homeowners demanded that an independent, impartial agency do the testing.

As a result of Mr. Schultz's subsequent efforts, the EPA was persuaded to do air monitoring in various homes in Newtown Crossing on April 6, 7 and 25, 1983. This data, which was clearly developed by an impartial, independent agency, was later submitted to the Centers for Disease Control, the Pennsylvania Department of Health, and the Bucks County Department of Health. These agencies used the EPA data and the Stewart-Todd data to develop criteria for the evacuation of homes. See Exhibits "B," "C," and "D."

Despite all the foregoing, numerous homeowners abandoned their residences and numerous lawsuits were filed in state court. As the litigation heads toward trial, SPL has requested that the homeowners admit the authenticity and accuracy of the EPA results. Ironically, the homeowners, who once demanded testing by an independent agency, have now refused to admit the accuracy of the EPA results.[2] Clearly they will not admit the

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2. Typically, the Hudacheks (plaintiffs in the Court of Common Pleas of Bucks County) have stated: "Plaintiffs are not able to admit that those records

results into evidence without an opportunity to cross-examine the chemist who did the testing.

ARGUMENT

Under the regulations governing testimony by agency employees in private lawsuits, the EPA must determine whether the proposed testimony is in the agency's interest, *e.g.* such as cooperating with Federal, state or local authorities in developing environmental standards and other policies, and it must also consider other factors such as the extent to which the proposed testimony will divert EPA resources from the agency's business, or whether the proposed testimony will give the appearance that the agency favors one side or the other side in the litigation. There is no set formula for weighing each of these factors in any given situation, but clearly all factors must be considered and the agency's decision must reflect a balancing of competing concerns. In the circumstances presented here, it is clear that the EPA Regional Counsel failed to give appropriate weight to all factors, and he thereby abused his discretion in refusing to permit Dr. Spittler to testify.

1. *Avoiding the appearance of taking sides*. This should be the least of EPA's concerns in this matter. EPA was involved in the Newtown Crossing situation through the efforts of Mr. Gary Schultz of the Pennsylvania Department of Health. Indeed, EPA was brought in because of its impartiality toward the potential antagonists in Newtown. EPA transmitted its results to Mr. Schultz who later distributed them to all concerned parties. All of this can be amply developed in Dr. Spittler's deposition testimony, and there is no realistic chance that any juror will believe that Dr. Spittler favors Sun Pipe Line Company just because he was called to testify by SPL. Indeed, his only interest, and SPL's only interest, is establishing the accuracy of

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are accurate, how the tests were conducted, the manner of interpretation of the tests or the accuracy of the results, which are specifically denied." Answer 2(a) to Requests for Admissions.

his results[3]. It will be for other experts to state whether the levels of vapors found were safe or toxic.

Giza v. Secretary of HEW, 628 F.2d 748 (1st Cir. 1980), is distinguishable because there the plaintiffs frankly admitted they were attempting to use the FDA employees as expert witnesses. *Id.*, 628 F.2d at 750-51 and n.3. SPL has no such interest in this case. Dr. Spittler's expertise in chemistry will be developed only to the extent necessary to prove his competence and ability to obtain correct air monitoring results[3] Other witnesses will present expert opinions that the levels of gasoline vapors present were not toxic.

2. *Avoiding Diversion of Agency Resources*. The major thrust of EPA's opposition to the deposition testimony of Dr. Spittler is the argument that agency manpower cannot be diverted from the thousands of hazardous waste sites around the country which deserve remediation. *See* EPA Br. at 6. This sounds like a "parade of horribles" argument, and one which is highly exaggerated, too.

The vast majority of private litigants in environmental lawsuits in state and federal courts will normally stipulate the truth and admissibility of EPA test results. It is submitted that the number of cases such as *Hudachek v. Sun Company*, where such admissions were not obtained, is relatively rare.[4]

Furthermore, the additional imposition on EPA's time is rather *de minimus* in this case. The record shows that two EPA

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3. In footnote 3 of its brief, EPA suggests that Dr. Spittler's results may be admitted in evidence under F.R.E. 803(8)(C), citing *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983). This suggestion offers little comfort to SPL because the Federal Rules of Evidence are not in effect in the Pennsylvania state courts. Absent Dr. Spittler's testimony and an opportunity for cross-examination, SPL cannot be assured that EPA's test results will be admitted in evidence.

4. EPA can certainly encourage stipulations by amending its regulations to require a showing that the party wanting the testimony has first attempted to obtain a stipulation or admission from the party opponent, just as SPL has done in this case. Normally this will work because, in most jurisdictions, a party opponent who refuses to make the admissions may be held liable for the costs and attorneys fees made necessary in adducing the proof.

employees were each involved on April 6, 7 and 25, 1983. In addition, there was lab work and correspondence. No doubt a minimum of 10 man-days was devoted by EPA to the Newtown Crossing project in 1983. Furthermore, in 1984, Dr. Spittler freely talked about his work on the telephone with counsel for SPL, and he furnished material from his files. *See* Exhibit "E," letter dated November 2, 1984 with attachments.

In this case, to reduce any inconvenience to EPA and Dr. Spittler, SPL is willing to do the videotape deposition in his home city or even at his office. The estimated length of this deposition is one to two hours.[5]

EPA's brief (at p. 7) seeks to support the Regional Counsel's action by citing opposition to disclosure of attorney-client privileged communications, intra-agency deliberations, and opinions by experts conducting work for EPA for possible use in agency litigation. Plainly none of these concerns are implicated in this case. In addition, all of Dr. Spittler's results have already been disclosed. EPA cannot possibly have any interest in maintaining confidentiality of Dr. Spittler's results.[6]

3. *Agency Interest*. It is certainly hoped that EPA does not take a purely parochial or narrow view in determining what its interests are. Often the interests of the agency and the interests of private litigants in the proper administration of justice are in harmony. The same public concerns which induced EPA to do air monitoring in Newtown Crossing in 1983 will still be at work in the forthcoming jury trials between SPL (and its co-defendants) and various displaced homeowners. The jurors, in the proper administration of justice, will want to know if any independent, non-aligned agency did any air monitoring, and if so, what were the results (if available and otherwise admissible). The jurors may or may not give more weight to the

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5. SPL has also offered to reimburse EPA for Dr. Spittler's time, but this offer has been discouraged.

6. In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Court upheld the Attorney General's decision not to permit disclosure of agency documents. In the present case, the documents are already universally available. *Cf. Sweet v. Schenk*, 792 F.2d 1447, 1452 (9th Cir 1986) (Norris, J., dissenting and distinguishing *Touhy*).

test results obtained by EPA (compared to those obtained by the industrial hygienists retained by SPL), but it certainly would not be surprising if they did. The EPA results may well enhance the jury's confidence in its verdict, whatever it is.

It is unlikely that EPA's image will be in any way tarnished or diminished by permitting Dr. Spittler to testify by videotape deposition. Indeed, permitting his testimony may well enhance the administration of justice. Certainly this is something "in the public interest," with which EPA's interests are not at all in conflict. On the contrary, EPA epitomizes a "public interest" governmental agency, and the citizens of the United States should be able to look to it for unbiased factual information concerning disputes about environmental matters.[7]

7. Even if one viewed EPA's interests narrowly, then the countervailing interests referenced above will balance if not outweigh the narrow agency interests.

CONCLUSION

Consideration of all elements in 40 C.F.R. §§2.401 *et seq.* clearly shows that the EPA Regional Counsel failed to give appropriate weight to the factors which auger for allowing the deposition of Dr. Thomas Spittler. The action of the Regional Counsel was arbitrary, capicious, and an abuse of discretion. This court should order the Regional Counsel to permit the deposition.

Respectfully submitted,

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[exhibits and certificate of service omitted]

[Handwritten Order in margin of Motion For Reconsideration Of Order Denying The Petition Of Sun Pipe Line Company To Require The Environmental Protection Agency To Produce Dr. Thomas Spittler For a Videotape Deposition]:

DENIED. The *Reynolds Metals* case cited by petitioner confirms the prior denial of the petition. 5/8/87 WJSkinner U.S.D.J.

Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1567

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN PIPE LINE CO., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1567

SUN PIPE LINE CO., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the courts below should have treated its motion for reconsideration as a motion to amend the complaint under Fed. R. Civ. P. 15.

1. In November 1982 a substantial quantity of petroleum leaked from a pipeline near Newton, Pennsylvania, that is owned and operated by petitioner. In April 1983 the Pennsylvania Department of Health asked Dr. Thomas Spittler, an employee of the Environmental Protection Agency (EPA), to monitor the quality of the air in the vicinity of the spill. He did so and reported his findings to state officials. Nearby homeowners subsequently brought suit against petitioner in state court, alleging property damage and adverse health effects as a consequence of the leak. Petitioner was found negligent after a trial, and the state court then scheduled a second trial to set damages. At that point, petitioner asked the state court plaintiffs to stipulate to the accuracy of Spittler's findings. The plaintiffs refused. Pet. App. A2.

Petitioner then sought to take Spittler's deposition. The Pennsylvania state court authorized the taking of the deposition, but never issued a subpoena. Petitioner nevertheless noticed the deposition and brought suit in the United States District Court for the District of Massachusetts, seeking an order requiring EPA to produce Spittler (who was based in Boston) to be deposed. Pet. App. A3. While the suit was pending, EPA refused to produce Spittler; the agency cited 40 C.F.R. 2.403, which authorizes EPA to grant requests for voluntary testimony by agency employees when doing so "would clearly be in the interests of EPA" (Pet. App. A34). The district court subsequently ruled against petitioner, holding that it lacked the authority to compel a federal employee, acting in his official capacity, to appear in state court (see *id.* at A3). Petitioner then filed a motion for reconsideration, arguing for the first time that EPA's refusal to authorize Spittler's testimony was arbitrary and capricious. The district court denied this motion (*id.* at A52).

The court of appeals affirmed, rejecting petitioner's argument that EPA's decision should be set aside under the Administrative Procedure Act (APA) (Pet. App. A1-A8). The court explained that petitioner's suit originally had sought relief in the form of mandamus, to which petitioner now conceded it was not entitled (*id.* at A4). The dispositive question on appeal, the court continued, was whether the district court acted properly in denying petitioner's motion for reconsideration – a motion that did not cite any particular provision of the Federal Rules of Civil Procedure, but which the court concluded should be treated as a motion under Fed. R. Civ. P. 59(e) (Pet. App. A4-A5). The court accordingly concluded that "the scope of [its] review extends only to the appropriateness of that denial – not to the fundamental correctness of the underlying judgment" (*id.* at A5). The court added that it "will

not overturn the trial court's decision on such a matter unless the appellant can persuade us that the refusal to grant the motion was a manifest abuse of discretion" (*ibid.*).

Here, the court held that, "[w]hatever view may be taken of the underlying merits of the case, the abuse-of-discretion argument simply will not wash" (Pet. App. A5). Even if petitioner is correct in asserting that EPA personnel decisions are subject to judicial review, the court explained, petitioner's "request for Dr. Spittler's testimony did not conform to [EPA] regulations, the complaint which [petitioner] filed in this action contained no charge of arbitrariness, and the motion to reconsider—though it contained such a charge—offered precious little to substantiate it" (*id.* at A6 (footnote omitted)). Instead, the court noted that the evidence on which petitioner principally relied in attempting to show an abuse of discretion by EPA consisted of "material which was never presented to the district court and which constitutes no proper part of the record on appeal" (*ibid.*). The court accordingly concluded that "there is no principled way in which the district court, in the circumstances of this case, can be said to have abused its discretion" (*id.* at A7). The court added that petitioner was in no position to "sweep procedural niceties under the rug," since it waited almost three years from the time of the initiation of the state court action to seek Spittler's deposition; "[h]aving indulged in such lassitude, [petitioner] can scarcely be heard to complain that established procedure should be discarded in order that it might extricate itself from a self-constructed box" (*id.* at A7-A8).

2. Petitioner does not contend that the court of appeals applied an improper standard in judging petitioner's reconsideration motion under Fed. R. Civ. P. 59. Nor could it; it is settled law that a district court's denial of a

Rule 59(e) motion will be set aside only for abuse of discretion.[1] Similarly, petitioner does not contend that the court of appeals was incorrect in its resolution of the only question that it actually decided: whether the district court abused its discretion in denying the Rule 59(e) motion for reconsideration. And again, that ruling plainly was correct: as the court of appeals explained, petitioner's request for Spittler's testimony failed to conform to EPA requirements, and petitioner's submission to the district court offered no reason to believe that the agency had been arbitrary in its decision.[2]

Instead, petitioner contends (Pet. 9-12) in this Court, for the first time in this proceeding, that its motion for reconsideration should have been treated as a motion to amend the complaint under Fed. R. Civ. P. 15(a). In making this argument, petitioner relies on *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), where the Court held that permission to amend a complaint pursuant to Rule 15(a) "should, as the rules require, be 'freely given.' " *Foman*, however, is inapposite here. In that case, the plaintiff had expressly sought to amend her complaint in the district court, and had argued the substance of her motion to amend on appeal (see 371 U.S. at 179-181). Here, in contrast, petitioner's motion simply sought reconsideration of the district court's initial decision (see Pet. App. A39-A41), and it was treated as a motion for reconsideration—not a motion to amend the complaint—by both courts below. Petitioner first raised the possibility of amending its com-

[1] See, e.g., *Thomas* v. *Farmville Mfg.*, 705 F.2d 1307 (11th Cir. 1983); *Huff* v. *Metropolitan Life Ins. Co.*, 675 F.2d 119 (6th Cir. 1982); *Weems* v. *McCloud*, 619 F.2d 1081 (5th Cir. 1980). See generally 6A *Moore's Federal Practice* § 59.15[4], at 59-336 (2d ed. 1987).

[2] Since the court below expressly did not reach the merits of petitioner's APA argument (see Pet. App. A6), there is no reason for this Court to consider petitioner's contentions on the merits (Pet. 12-18).

plaint in its petition for a writ of certiorari in this Court. There is no reason for this Court to address petitioner's argument now.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1988

[1] In any event, the Court made it clear in *Foman* that motions to amend under Rule 15(a) may be denied when, for example, the movant has demonstrated "undue delay" (371 U.S. at 182). That is the case here, where the court of appeals noted petitioner's "lassitude" in its attempts to obtain Spittler's testimony (Pet. App. A7).

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60457

Supreme Court, U.S.
FILED
JUN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1567

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SUN PIPE LINE COMPANY,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondent

PETITIONER'S REPLY MEMORANDUM

Sun Pipe Line Company (hereinafter "SPL")[1] respectfully submits this reply memorandum to the Memorandum For The United States In Opposition.

1. SPL agrees that a motion for reconsideration under Fed. R. Civ. P. 59(e) should be set aside only for abuse of discretion. However, the leading authority cited by the Solicitor General, *Thomas v. Farmville Mfg.*, 705 F.2d 1307 (11th Cir. 1983), thoroughly supports SPL's position. In that case, the court of appeals held as follows: "The order dismissing the complaint is VACATED and the case is REMANDED to the district court with directions to allow the filing of an amended complaint." *Id.*, 705 F.2d at 1308. The court, citing *Foman v. Davis*, 371 U.S.

1. The petition for a writ of certiorari included SPL's Rule 28.1 listing at pp. ii-iii.

178 (1962), said it was an abuse of discretion not to allow the filing of an amended complaint following dismissal for failure to state a claim. *Id.*

A court would be less likely to abuse its discretion if it failed to allow an amendment to a complaint after trial on the merits or disposition of cross-motions for summary judgment. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). However, this is clearly not the situation in the present case.

The Solicitor General's statement (Mem. at 4) that "petitioner does not contend that the court of appeals was incorrect in its resolution of the only question it actually decided: whether the district court abused its discretion in denying the Rule 59(e) motion . . ." is a complete misstatement of SPL's position.

2. The Solicitor General argues that "as the court of appeals explained, petitioner's request for Spittler's testimony failed to conform to EPA requirements," and therefore there was no abuse of discretion in not allowing an amended complaint (Mem. at 4). See footnote 6 of the court of appeals' opinion (A-6). In judicial review of agency action, the adequacy of the request is only one factor. The court of appeals improperly focused on perceived deficiencies in SPL's request to E.P.A. rather than the agency action complained of. It is noteworthy that under the E.P.A. regulations, 40 C.F.R. §2.404(a) (A-19), the agency must still evaluate a "request" when it comes in the form of a subpoena, though a subpoena would contain no explanation as to why it would be in the agency's interest to comply. Judicial review of agency action must therefore focus on the basis for the agency's decision, not the form of the request.

3. The Solicitor General states (Mem. at 4) that SPL "contends in this Court, *for the first time in this proceeding*, that its motion for reconsideration should have been treated as a motion to amend the complaint . . ." (Emphasis supplied.) This is another misstatement. SPL thoroughly set forth its reliance on Rule 15(a) and *Foman v. Davis*, *supra*, when it sought rehearing in the court of appeals. SPL did not do it earlier because E.P.A. never invoked Rule 59(e) or "the abuse of discretion" standard in

its brief to the First Circuit seeking affirmance of the district court's order. E.P.A. argued it should win on the merits (*i.e.*, judicial review was unavailable and/or the agency decision was not arbitrary, capricious, or an abuse of discretion), but the court of appeals raised the Rule 59(e) issue *sua sponte* at oral argument.

In the district court, the "motion for reconsideration" was so labeled because the trial judge suggested a motion for reconsideration (A-38). In the court of appeals, E.P.A., recognizing that substance not form should govern, was content to treat SPL's complaint in the district court as if it had been amended.[2] E.P.A. is now relying on Rule 59(e) for the first time in order to avoid Supreme Court review.

4. The Solicitor General twice refers to the court of appeals' finding of SPL's "lassitude" to support its holding that there was no abuse of discretion in denying "the motion for reconsideration" (Mem. at 3 and 5 n.3). As the court of appeals noted, counsel for SPL first contacted Dr. Spittler in September 1984, but did not seek his deposition until April 1987 (A-7, A-49).

The court of appeals' finding of "lassitude" was an unwarranted inference from the evidence before it. Based on Dr. Spittler's cooperative attitude in 1984, counsel for SPL had no reason to believe there would be any problem in obtaining his testimony if it was needed at a later time. Indeed, the E.P.A. regulations at issue in this case were not promulgated until August 1985. The litigants in the state court, including SPL, were pre-occupied with a liability trial until October 1986, during which discovery on damages was stayed. SPL served appropriate requests for admissions to the Newtown Crossing claimants soon after a schedule was set for the trial of the damage claims. This was not "lassitude."

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2. As the court of appeals recognized, the "motion for reconsideration" included a plea to set aside the agency action as arbitrary and capricious (A-3, A-5). This was SPL's endeavor to provide authority, as requested by its counsel before the district court (A-38). Thus, despite its title, SPL's motion was clearly a motion to vacate the judgment and amend the complaint.

When E.P.A. took the surprising position that it would not permit a deposition of Dr. Spittler to adduce relevant factual evidence, SPL had no choice but to pursue this lawsuit.[3] The seven days between the filing of SPL's original petition and its "motion for reconsideration" (April 29 to May 6, 1987) was not a prejudicial delay to E.P.A. within the meaning of *Foman v. Davis, supra*. There is no evidence the district court relied on the "delay" between 1984 and 1987 as the basis for denying SPL's "motion for reconsideration."

CONCLUSION

For the foregoing reasons, and for the reasons previously argued, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 3, 1988

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3. In *Southeastern Pennsylvania Transportation Authority v. General Motors Corp.*, 103 F.R.D. 12 (E.D. Pa. 1984), the court ordered a deposition of a non-party federal employee over objections that D.O.T. regulations similar to those at issue in this case precluded the testimony. The court held that to the extent fact testimony was desired, D.O.T.'s opposition was an unreasonable exercise of administrative discretion. *Id.*, 103 F.R.D. at 14. The court plainly engaged in judicial review of agency action in applying its regulations. *Id.* D.O.T. did not appeal.